IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 596

UNITED STATES OF AMERICA,
Petitioner,

vs.

WALTER KORPAN,
Respondent.

BRIEF FOR WALTER KORPAN.

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QUESTION PRESENTED.

The correct question presented is:

"Whether a pinball game is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461(2) upon 'so-called "slot" machines' as defined in 26 U. S. C. (Supp. III) 4462(a)(2)."

SUMMARY OF ARGUMENT.

I.

The pinball games here involved are not subject to the $250 tax imposed upon "so-called 'slot' machines." The holding of the Court of Appeals for the Seventh Circuit that the use by Congress of the well-known term "so-called 'slot' machines" did not intend to include the equally well-known "pinball game", was confirmed in its opinion both by the language of the statute and by a lengthy and uniform legislative history.

The term "slot machine" either means (a) any machine equipped with a slot for the reception of coins—a broad meaning, obscure and seldom-used, or (b) a machine in which the insertion of a coin releases a lever which when pulled activates a series of spring-driven drums or reels with insignia such as bells and fruit, known colloquially as a "one-armed bandit," which is the common, ordinary meaning.

Since Congress imposed a $10 tax on any amusement or music machine "operated by means of the insertion of a coin, token, or similar object" and a $250 tax only on "so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object," to apply the broad but obscure meaning to "so-called 'slot' machine" would render that clause redundant and meaningless.

Legislative history shows that Congress originally imposed the lower tax upon "so-called 'pin-ball' and other amusement machines" and the higher tax on "so-called 'slot' machines." In changing the lower tax category to "any amusement or music machine," Congress clearly expressed its intention that "under this amendment there

will be included *in addition to pin-ball machines*, a great variety of other machines * * *." H. R. Rep. No. 2333, 77th Cong., 2d Sess., p. 180 (1942).

Additional support for the construction of the statute adopted by the Court of Appeals is given by the Johnson Act, 15 U. S. C. Sec. 1171(a), which describes a "so-called 'slot machine'" as a device "an essential part of which is a drum or reel with insignia thereon."

Although the Treasury Department had issued in 1942 a regulation, T. D. 5203, which included pinball games in the category of devices taxed at $250 as "so-called 'slot' machines," the regulation was not enforced. Contrary rulings were handed down by the Treasury Department (R. 89-91). The Department's forms indicated a contrary interpretation (R. 94). In any event the regulation was contrary to the plain meaning of the statute itself.

In addition to the language and legislative history of the statute, there are substantial economic and social reasons for the distinction by Congress in taxing slot machines at a high rate and pinball games at a low rate.

The games here involved have all of the structural and operating characteristics of pinball games and none of those of slot machines. They fit the dictionary and court definitions of pinball games, conform to the common understanding of pinball games, and are readily distinguished, by witnesses for both the United States and the respondent, from slot machines (R. 20, 60-1).

Pinball games provide entertainment and amusement whereas slot machines afford no amusement, except that of possibly receiving money, and within a few seconds part the player from his money. Slot machines are devices of pure chance whereas pinball games require the application of some skill on the part of the player.

The fact that persons may bet upon the result of a pin-

ball game or that the owner or possessor of the game may redeem free plays in money does not change the game from a pinball game into a "slot machine" as the term is used in Section 4462(a)(2).

II.

If the pinball games here involved are construed to be slot machines, the statute is unconstitutional and void since such a construction would inject such vagueness and uncertainty into a penal statute as to constitute denial of due process of law and would be arbitrary and discriminatory.

III.

In any event the respondent did not *wilfully* fail to pay the $250 tax imposed by 26 U. S. C. Section 4461(2).

ARGUMENT.

I.

THE PINBALL GAMES HERE INVOLVED ARE NOT SUBJECT TO THE $250 TAX IMPOSED UPON "SO-CALLED 'SLOT' MACHINES" AS USED IN 26 U. S. C. 4462(a)(2).

A. The Plain Meaning of the Language Used in the Statute and the Clear Intent of Congress in the Enactment Thereof Expressly Excludes Pinball Games from the Category of "So-Called 'Slot' Machines".

The Court of Appeals for the Seventh Circuit, in holding that the use by Congress of the well-known term "so-called 'slot' machine" in a taxing statute did not intend to include the equally well-known "pinball game," was confirmed in its opinion both by the language of the statute and by a lengthy and uniform legislative history.

By Section 4462(a)(1) of the Internal Revenue Code, a coin-operated device, taxable at the rate of $10 per year, is described as follows:

> "any amusement or music machine operated by means of the insertion of a coin, token or similar object * * *"

On the other hand, coin-operated devices, taxable at the rate of $250 per year, are defined by Section 4462(a)(2) of the Code as follows:

> "so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."

The term "so-called 'slot' machines" is not further defined in the Internal Revenue Code.

The statutory categories being mutually exclusive, it is readily apparent that a coin-operated device, other than a "so-called 'slot' machine" is taxable at the rate of $10 per annum. The respondent in this case paid the $10 annual tax imposed by Section 4461 as to each coin-operated device in his possession. The United States contends, however, that the respondent should have paid $250 per year as to each device on the theory that the respondent's coin-operated devices, which are commonly called pinball games, are in reality slot machines.

The plain meaning of the statute as well as every other test designed to determine the intent of Congress conclusively exposes the fallacy of the United States' theory.

Before examining the language of Section 4462(a)(2), it is important to note that the District Court fined the respondent $750 (R. 97). Penal statutes are never to be enlarged by interpretation. *United States* v. *Five Gambling Devices,* 346 U. S. 441, 449, 452 (1953). In *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218 (1952), Mr. Justice Frankfurter said at pages 221-2:

> "• • • *when choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.*" (Emphasis added.)

Furthermore, in the construction of a taxing statute, all doubts are to be resolved in favor of the taxpayer. *United States* v. *Merriam,* 263 U. S. 179, 187-8 (1923). In *Gould* v. *Gould,* 245 U. S. 151 (1917), the Supreme Court said on page 153:

> "In the interpretation of statutes levying taxes it is

the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."

1. The Plain Meaning of the Term, "So-Called 'Slot' Machines", as Used in the Statute, Does Not Embrace Pinball Games and Similar Devices.

The term "slot machine" has two separate and distinct meanings. In one sense, it refers to any machine equipped with a slot for the reception of coins. In this broad sense it includes food and drink vending machines, cigarette dispensers, pay telephones, turnstiles, parking meters, automatic phonographs and the variety of amusement games found in a penny arcade, none of which are embraced by the term used in the statute. In the advancing age of automation the ordinary citizen has daily contacts with a host of such "slot machines." This meaning is obscure and seldom if ever used.

The second meaning of the words "slot machine" is the usual one. It refers specifically to a mcahine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit. The operator has no control over the combination in which the insignia cease rotating and such combination determines whether the operator merely loses the coin he inserted or whether he wins additional coins in varying numbers. If coins are won, they are released from the machine and drop into a receptacle where they may be claimed by the operator (R. 60). Because this

type of machine is operated by a single handle and because the odds of the operator winning are so slight, it has been colloquially called a "one-armed bandit."

When Congress defined the types of devices subject to the $250 per year tax in Section 4462(a) (2) as "so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object", it clearly and plainly did not refer to slot machines in their broad sense of all machines "which operate by means of insertion of a coin." This is obvious because the phrase "operated by means of the insertion of a coin, token, or similar object" is expressly set forth as a part of the statutory definition of *both* of the types of machines which are subject to the tax imposed by these sections of the Code. In other words, no device is within either of the definitions set forth in Section 4462(a) of the Code, and no device is subject to the taxes imposed by Section 4461 unless it is a "slot machine" in the sense that it is operated by means of the insertion of a coin, token or similar object. But the phrase "so-called 'slot' machine" is expressly contained in the definition of devices subject to the $250 tax. Clearly, the use of that language is redundant and even anomalous if its meaning is no different from that of the phrase, "operated by means of the insertion of a coin, token or similar object." It follows, that if the redundancy is to be avoided and if any meaning is to be given to the language which Congress has adopted in this instance, then the phrase "so-called 'slot' machine" must necessarily have been used in the narrower sense of describing a "one-armed bandit". This is the common, ordinary meaning of "slot machine"; it is the only meaning which can give effect and substance to the statutory language.

Every other word and phrase in Section 4462(a) confirms this interpretation. If Congress intended (a)(2) to refer to slot machine in its broad sense, the word "so-

called'' would be surplusage and entirely unnecessary. Webster's New International Dictionary, 2d edition, 1955, defines ''so-called'' as

> ''Commonly named; thus termed;—implying doubt as to the correctness or propriety of so designating the person or thing.''

If Congress intended ''slot machines'' to mean any machine with a coin slot, it would have had no occasion to imply a more restrictive meaning by use of the adjective ''so-called.'' The same argument can be applied to the use by Congress of quotation marks in the term ''so-called 'slot' machines.'' By emphasizing the word ''slot'', particularly in the phrase ''so-called 'slot' '', Congress plainly indicated that it intended that ''slot'' be used in a sense other than as a mere coin receptacle, but rather in the colloquial sense of a ''one-armed bandit.'' This construction receives support from the common slang contraction of slot machines as ''slots.'' A ''slot'' is a one-armed bandit and nothing else. Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co.* v. *Hoffman,* 101 U. S. 112; *Adler* v. *Northern Hotel Co.,* 175 F. 2d 619, 621 (C. A. 7th, 1949).

Looking at the words in Section 4462(a)(2) following and further defining ''so-called 'slot' machines'' also bolsters the construction that Section 4462(a)(2) applies to one-armed bandits only. They are machines

> ''which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.''

The purpose of Congress in adding the language after the words ''so-called 'slot' machine'' was undoubtedly to define those words. There is nothing in this definitive lan-

guage extending the meaning of slot machines beyond one-armed bandits. Another possible purpose for the definitive language was to exclude from the $250 tax category toy slot machines, used for amusement, which do not deliver or entitle the player to receive cash, premiums, merchandise or tokens.

If Congress intended to draw a line between "coin-operated amusement devices" taxable at $10 and "coin-operated gaming devices" taxable at $250, as the United States contends (Brief for the United States, pages 26-7), Congress could have said so as simply as that without the use of the words "so-called 'slot' machine." Actually the statute reads in part as follows:

> "* * * The *term* 'coin-operated amusement *or* gaming device' *means*—(1) any amusement or music machine * * * *and* (2) so-called 'slot' machines * * *." (Emphasis added.)

The word "term" is singular and not plural which would imply that the quoted phrase "coin-operated amusement or gaming device" is one inclusive thing. Sub-paragraphs (1) and (2) are joined by "and". While it is a natural error, after reading the sections, to divide these phrases in chronological order and to assume that sub-paragraph (1) pertains solely to "amusement devices" and that sub-paragraph (2) pertains to "gaming devices", actually sub-paragraphs (1) and (2) are conjunctive definitions of one phrase—"coin-operated amusement or gaming device"—and the only purpose of the two definitions is to divide the devices into those subject to the $10 tax and "so-called 'slot' machines" subject to the $250 tax.

The United States' interpretation amounts to an attempt to change the wording of Section 4462(a)(2) of the Code to read as follows:

> "So-called 'slot' machines *and any other devices,* which operate by means of insertion of a coin, token

> or similar object and which, by application of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens." (Italicized words supplied.)

The statute, however, does *not* so read. As passed by Congress, it refers only to "so-called 'slot' machines" and establishes certain additional criteria for the imposition of the $250 tax on these machines. The words "and any other devices" do *not* appear in the existing Section 4462(a)(2).

The plain meaning of the statutory language thus leads to the inescapable conclusion that the $250 tax imposed under Section 4461 of the Code is applicable only to "one-armed bandits". It is not applicable to other coin-operated mechanisms which lack the essential elements of those devices.

2. The Legislative History of the Statute Manifests the Clearly Expressed Congressional Intent to Exclude Pinball Games from the Category of Devices Taxable as Slot Machines.

If any doubt existed as to the plain meaning of the statutory language, that doubt is resolved by an examination of the legislative history of these provisions of the Code. In *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534 (1940), the Supreme Court said at pages 543-44:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

The interpretation of the statutory language, discovered in its plain meaning, is fully borne out by an examination of the legislative history of Sections 4461 to 4463 of the

Internal Revenue Code. These sections were first proposed by the House of Representatives of the 77th Congress as part of the Revenue Revision of 1941. As passed by the House, H. R. 5417, Section 555, assessed a tax of $25 on each "coin-operated amusement and gaming device". That term was defined as including:

> "(1) so-called 'pin-ball' and other similar amusement machines, operated by means of the insertion of a coin, token, or similar object, and
>
> "(2) so-called 'slot' machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens."[1]

The House obviously understood that pinball machines and slot machines were not the same, despite the fact that it imposed a uniform $25 tax on each. If pinball machines were included in the general classification of slot machines, it was wholly unnecessary to mention them in a separate clause.

At subsequent hearings before the Senate Finance Committee, representatives of the coin machine industry appeared and emphasized that the proposed tax upon amusement machines was not economically feasible and that its imposition would result in a probable loss of revenue by removing thousands of such machines from circulation (Hearings before Senate Finance Committee on H. R. 5417, 77th Cong., 1st Sess., pp. 1210-1215 (1941)). The Senate was obviously impressed by this possibility. The proposed bill, as passed by the Senate, accepted the classification of

1. The report of the Ways and Means Committee also treated slot machines and pinball machines as separate categories. The report stated: " 'Coin-operated amusement or gaming devices' are briefly, machines which fall within the general classification colloquially referred to as 'pin-ball' machines and 'slot' machines." H. R. Rep. No. 1040, 77th Cong., 1st Sess. p. 60 (1941).

pinball machines as separate and apart from slot machines, and reduced the tax on the former to $10 per machine while increasing the tax on the latter to $50 per machine. The report of the Senate Finance Committee emphasized the basic intention to distinguish pinball machines from slot machines. It stated that:

> "The House bill places a special tax of $25 per year upon each coin-operated amusement or gaming device maintained for use on any premises.
>
> "Your Committee divides these devices into two categories. Upon so-called pin-ball or other amusement devices operated by the insertion of a coin or token, the tax is reduced to $10 per year. Upon so-called slot machines, however, the tax is placed at $200 per year."[2]

The conference report was in accord in its understanding of the Senate amendment. The report (H. R. Rep. No. 1203, 77th Cong., 1st Sess. p. 18 (1941)) stated that, "the amendment establishes two different rates of tax: $10 per annum in the case of a pinball game, or similar game or amusement machine, and $50 with respect to so-called slot machines, the operation of which involves an element of chance." The House accepted the Senate amendments and the bill became law as Section 3267 of the Internal Revenue Code of 1939 (Public Law 250, 77th Cong., 1st Sess.).

Thereafter, in response to increased demands for tax revenue brought about by the outbreak of war, many new excise taxes were adopted by enactment of the Revenue Act of 1942, and the $10 tax on pinball machines was extended to other amusement devices and to coin-operated music machines. This was done by amending the original

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2. Sen. Rep. No. 673, 77th Cong., 1st Sess. p. 21 (1941). See also p. 55.

definition of the 1941 House bill to describe "any amusement or music machine * * *."[3]

But the enlargement of the category of machines subject to the $10 tax did not remove pinball machines from that classification. On the contrary, the Congressional reports on the amendment reaffirmed the intention to continue the inclusion of pinball machines under the $10 tax. In H. R. Rep. No. 2333, 77th Cong., 2d Sess., p. 180 (1942), it was stated:

> "This section amends Section 3267 of the Code by defining 'coin-operated amusement devices' to include all amusement machines and music machines operated by means of the insertion of coins, tokens, or similar objects. Under this amendment there will be included *in addition to pin-ball machines* a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games."[4]

With the exception of periodic increases in the rate of taxation and technical changes of form adopted in 1954, the provisions of former Section 3267, as amended in 1942, remain unchanged as Sections 4461 to 4463 of the present Revenue Code.

Nothing in the 1941 and 1942 Revenue Acts or in the Committee Hearings and reports on those Acts suggests an intent to include pinball machines in a broader classi-

3. H R. 7387, Sec. 617, 77th Cong., 2d Sess. (1942). In order to placate the fears of some manufacturers who were worried that their machines might be subject to the higher tax, the 1942 Act also specifically stated that certain gum-vending machines which contained some of the characteristics of slot machines would not be taxed as slot machines. See Hearings before Senate Finance Committee on H. R. 7378, 77th Cong., 2d Sess., pp. 1135-41 (1942).

4. Emphasis added. See also Sen. Rep. No. 1631, 77th Cong., 2d Sess. p. 266 (1942), which again refers to the "tax of $10.00 per year with respect to so-called pinball and other similar machines."

fication as one of a variety of slot machines. Surely it would have been meaningless to refer to pinball machines by name and to classify them separately for tax purposes if they were also includible within the slot machine category.

It is pertinent to note that at the hearings before the Committee on Ways and Means as recently as on August 5, 1953, Congressman Eberharter said (Hearings, 83rd Cong., 1st Sess., p. 2517):

> "*What we intended was to tax one-armed bandits $250.*" (Emphasis added.)

The Court of Appeals examined and considered the legislative history of the taxing statute in great detail and quoted extensively from Congressional committee reports (R. 115-117), which are, as a rule of statutory interpretation, to be given greater weight than the statements of individual Congressmen on the floor of Congress. *United States* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310 at 318; *Lapina* v. *Williams*, 232 U. S. 78 at 90; *Jefferson* v. *United States*, 178 F. 2d 518 at 520, aff'd. in 340 U. S. 135; *Nicholas* v. *Denver and Rio Grande Western R. Co.*, 195 F. 2d 428 at 431; *Gan Seow Tung* v. *Carusi*, 83 F. Supp. 480 at 481. In *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), Mr. Justice Jackson said in a concurring opinion at pages 395-6:

> "Resort to legislative history is only justified where the face of the act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. * * * But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions."

However, an examination of debate on the floor of Congress *in its full context* merely serves to strengthen the result reached by the Court of Appeals. The United States quotes a portion of the debate which occurred in the Senate on September 4, 1941 (87 Cong. Rec. 7298, 7301; Brief for the United States, pages 28-30).

On the same day, September 4, 1941, that the language quoted in the Brief for the United States was uttered, Senator Clark of Missouri and other Senators made other statements which clearly reinforce the opinion of the Court of Appeals:

> "Mr. Clark of Missouri. * * * But at the same rate the Ways and Means Committee included the so-called one-armed bandits, which are notoriously a racket. I refer to the machines with the lemons, plums, oranges, and what-not, which are notoriously gambling machines. Such machines were put in the same category in the tax bill.
>
> * * * * *
>
> "But in the same category were also included the 'one-armed bandits', which have been a racket in every state of the Union except the very few States in which they have been legalized—in my opinion, to the disgrace of those States.
>
> * * * * *
>
> "Then, Mr. President, I am proud to say that on my motion the tax on the 'one-armed bandits' was increased from $25 to $200." 87 Cong. Rec. 7298.
>
> * * * * *
>
> "Mr. Bailey. * * * The purpose of the amendment is to bring about the prohibition of gambling through the 'one-armed bandits' or to bring an end to robbery through the 'one-armed bandits'." 87 Cong. Rec. 7298.
>
> * * * * *
>
> "Mr. Clark of Missouri. * * * Almost universally in the lowest-income brackets the poorest people send children to the grocery store to buy groceries, and

they are attracted by the prospect of return from these—two lemons or two oranges, or two prunes, or whatever they may be." 87 Cong. Rec. 7300.

* * * * *

"Mr. Clark of Missouri. * * * The House provision proposes to raise the same rate of revenue from 'one-armed bandits' as from the little, innocent pinball machines." 87 Cong. Rec. 7300.

* * * * *

"Mr. Clark of Missouri. * * * I am frank to say that my purpose in offering in the Finance Committee the amendment imposing a tax of $1,000 on slot machines was to make the rate absolutely prohibitive, and put these 'one-armed bandits' out of business." 87 Cong. Rec. 7300.

The pinball games considered by the Court of Appeals are not one-armed bandits and they do not have lemons, plums, oranges and prunes.

3. The Use of the Term, "Slot Machines," as Descriptive of Only One-Armed Bandits Is Further Demonstrated by an Examination of a Statute in Pari Materia.

The Supreme Court of the United States has consistently held that when two acts are in *pari materia*, the one passed later may be used as an aid in interpreting the earlier. See *United States* v. *Freeman*, 3 How. (U. S.) 556, 564 (1845); *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309 (1911); and *Great Northern Ry.* v. *United States*, 315 U. S. 262, 276 (1942).

It is significant that Congress, in connection with the only other appearance in the Federal statutes of the term "so-called 'slot' machines", has unequivocally adopted the commonly accepted definition of that term.[5] The John-

5. The only state statute comparable to 26 U. S. C. 4461-4462 is described in Federation of Tax Administrators Research Report No. 24, *State Taxes on Gambling* (February 15, 1949), as follows on pages 8-9, 11: "*Washington.* This statute dis-

son Act, passed on January 2, 1951, which prohibits the interstate shipment of slot machines, defines "gambling device" as including "any so-called 'slot machine' or any other machine or mechanical device *an essential part of which is a drum or reel with insignia thereon.*"[6]

Nor can it be contended that Congress in its earlier passage of the occupational tax on coin-operated devices should have added the phrase "an essential part of which is a drum or reel with insignia thereon" after the words "so-called 'slot machine'." In the Johnson Act the definition of a "gambling device" includes "any so-called 'slot machine' *or* any *other* machine or mechanical device an essential part of which is a drum or reel with insignia thereon." In the tax act, the $250 tax is applicable *only* to "so-called 'slot' machines." Both acts plainly refer to one-armed bandits of conventional form. The Johnson Act goes a step further and also includes one-armed bandits disguished in some other form.

The Johnson Act is additional support of the interpretation of the Court of Appeals which is based primarily

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tinguishes between coin operated gambling games which require some element of skill in playing and those which pay out on a pure chance basis. As skill games, the Washington tax classifies such devices as 'payout' pinball machines, iron claw machines, and traveling cranes. The 'pure chance' category is comprised of devices of the 'one-armed bandit' variety. * * * The Washington tax uses as its measure gross operating income which is defined as the gross amount paid into the machine less the amount paid out as winnings. Other than 'payouts' no other deductions are permitted in computing the tax base. * * * The suggestion has been made that administration of a tax of this type would be facilitated considerably if a meter could be installed on each machine to record its total receipts."

6. 15 U. S. C. Sec. 1171(a); emphasis added. See also the House Report which states that, "Paragraph (1) of the definition deals with machines and mechanical devices commonly known as slot machines. These machines commonly employ drums or reels with insignia thereon which are activated either mechanically or in some other manner as, for example, by electric power." H. R. Rep. No. 2769, 81 Cong., 2d Sess. (1950).

upon the language of Section 4462(a)(2) and its legislative history.

4. The Legislative Distinction Between Pinball Games and Slot Machines Was Long Recognized in the Administrative Interpretation of the Statute by the Treasury Department.

For many years the Treasury Department itself recognized the statutory distinction between pinball games and slot machines. Treasury Department Form 11-B (Resp. Ex. 1; R. 81, 94), which is the special return used in connection with the tax on coin-operated amusement and gaming devices, formerly described the statutory categories as follows:

> "Coin-operated AMUSEMENT DEVICES (pinball and all other amusement or music machines) * * *
>
> "Coin-operated GAMING DEVICES (slot machines and all other machines involving an element of chance)."

According to the testimony of the United States' witness, a miscellaneous tax technician employed by the District Director of Internal Revenue, it was not until 1952 that Form 11-B was revised to omit the express reference to pinball machines (R. 12; Resp. Exs. 1 and 2; R. 81, 94, 95).

T. D. 5203 was issued late in 1942. The fact remains, however, that as far as counsel for respondent have been able to determine, no attempt was made to prosecute a failure to pay the $250 tax with respect to pinball games prior to about the time this case was commenced. At the trial, counsel for respondent read into the record photostatic copies of letters dated late in 1951 clearly indicating that T. D. 5203 was not being enforced almost ten years after its promulgation (R. 89-91).

The Treasury Department's interpretation of the statute and its relation to private arrangements by a proprietor to pay cash in connection with a device not designed for

such payments, was given by the Collector of Internal Revenue at Indianapolis in an opinion dated August 17, 1951 (R. 89-90):

> "Reference is made to your letter of August 15, 1951, stating that you are operating a machine referred to as one ball. It does not have a slot paying money in case of a winning score. The player can refuse the free game or games and take cash. The cash is given by the operators of the establishment where the machine is placed. This is the arrangement made between yourself and the proprietor of the establishment. There is nothing on the machine explaining this or anything else concerning a prize.
>
> "You are advised that in this connection the Commissioner of Internal Revenue has held *that the machine must deliver to the person playing, cash, tokens, premiums, or merchandise, or tokens. In other words, the machine must have a legend inscribed thereon notifying the player what he is to receive.* Private arrangements between the player and the proprietor would not bring the machine within the classification of a gaming device.
>
> "From the information submitted, these machines would only be subject to the coin operated amusement device special tax." (Emphasis supplied.)

In *Casey* v. *Sterling Cider Co.*, 294 F. 426 (1st Cir., 1923) the court said (p. 429):

> "Furthermore counsel for the defendant has presented photostatic copies of letters coming from the office of the Commissioner of Internal Revenue in the Treasury Department, written in October, 1917, and September, 1918, before and after the promulgation of regulation 44, stating that sweet cider was not taxable under the act of 1917; and he further states, without contradiction, that while the regulation may have been enforced in some places, it was not generally throughout the country, all of which indicates that there was no uniform enforcement of or general acquiescence in the regulation as the true construction of section 313(b)."

Moreover, T. D. 5203 is clearly inconsistent with the provisions of section 4462(a)(2), limiting the $250 tax to "so-called 'slot' machines." It is elementary law that a Treasury Regulation which is inconsistent with a provision of the Internal Revenue Code has no force and effect. *Busey v. Deshler Hotel Co.*, 130 F. 2d 187 (6th Cir. 1942); *F. H. E. Oil Co.* v. *Commissioner*, 147 F. 2d 1002 (5th Cir. 1945). Since it not only conflicts with the statute but also was never followed, T. D. 5203 has no bearing upon this case. Therefore it cannot be argued that Congress reenacted Sections 4461 to 4463 in the light of T. D. 5203. On the contrary, it may fairly be said that the reenactment was effected with knowledge by Congress of the Treasury Departments' non-adherence to T. D. 5203.

5. The Exclusion of Pinball Games from the Category of Slot Machines Is Founded Upon Substantial Economic and Social Distinctions.

There are substantial economic and social reasons for differentiating between slot machines and pinball games. These reasons were presented to Congress during the public hearing which led to the passage of the Occupational Tax on Coin-Operated Devices and undoubtedly were the factors which resulted in the clear intent of Congress to levy a $250 per year tax on slot machines and a $10 per year tax on pinball machines and other amusement devices.

The House Committee Report upon the bill later enacted as the Johnson Act (64 Stat. 1134, 15 U. S. C. Secs. 1171-1177), prohibiting shipment of gambling machines in interstate commerce, recited that slot machines were resulting in substantial revenues to nation-wide crime syndicates. H. R. Rep. No. 2769, 81st Cong., 2d Sess. pp. 4-6; *United States* v. *Five Gambling Devices*, 346 U. S. 441, 450, footnote 13. (1953). In an article entitled "Slot Machines and Pinball Games" which appeared in 269 Annals of the

American Academy of Political and Social Science 62 (May, 1950), the editor stated that "this article is written by thoroughly competent persons whose names, by reason of their present connection with an investigation of slot-machine operations, are not here disclosed." At page 68, these authors comment upon the erroneous impression that there is any connection between the slot machine business and the pinball business and they conclude:

> "However, the pinball business is today part of the coin-operated amusement industry.
>
> • • • • •
>
> "After the war it became apparent to the manufacturers that the pinball game's greatest appeal was as an amusement device, and that the majority of pinball machines in the country were being so operated.
>
> • • • • •
>
> "Because the general public often links the pinball machine with the slot-machine racket, anti-slot-machine campaigns have often resulted in subjection of pinball games to restrictive legislation and high taxes • • •
>
> "The pinball and other amusement machine manufacturers are determined to divorce themselves from the gambling part of the coin-machine industry, and • • • have embarked on a vigorous anti-slot-machine antigambling program."

The Federation of Tax Administrators, an organization composed of the revenue commissioners of the forty-eight states, in its Research Report 24, entitled "State Taxes on Gambling," published February 15, 1949, states that pinball machines are designed for diversion only and "comprised essentially a reputable branch of the amusement industry" (page 14).

The Hearings before the Senate Finance Committee on H. R. 5417, 77th Cong., 1st Sess., leading to the passage

of the Occupational Tax on Coin-Operated Devices, contained the following at page 1211:

> "The average life of a slot machine in productive use is at least 5 years—there being on location today, any number of such machines which are 10 to 15 years old and older. Amortization and depreciation are figured roundly at the rate of a few pennies per week.
>
> "On the other hand, the life of a pinball machine rarely exceeds 4 months of top productive use, after which it must be placed in outlying areas where the income is greatly reduced. After several months additional use, its value is practically nil. The cost of a pinball machine must be entirely amortized within a period of from 9 to 12 months—the greatest portion of the depreciation and amortization taking place during the first 4-month period."

B. The Games Here Involved Are Pinball Games and Not "So-Called 'Slot' Machines".

1. The Coin-Operated Machines Involved Herein Are Typical Pinball Machines, Having None of the Structural or Operating Characteristics of Slot Machines.

The coin-operated machines introduced into evidence as United States Exhibits 3, 4 and 5 were pinball games of the type known as "bingo" or "in-line" games and were further identified by the manufacturer, the Bally Manufacturing Company, as the "Hi-Fi", "Variety" and "Gaiety" machines (R. 56, 80). Each of the games consisted of a horizontal playing surface containing obstacles and apertures, and a vertical scoring board upon which the player's score and other aspects of the game are recorded. The machines were made operative by the insertion of one or more coins. A complete game is played by propelling five or more steel balls across the playing surface. As each ball enters a numbered aperture on the playing surface, a corresponding light on the scoring board is illuminated, and upon illumination of three or more lights

in any horizontal, vertical or diagonal row the player is awarded one or more "free plays"; *i.e.*, the right to continue playing the game without the insertion of additional coins (R. 56-61, 112).

These devices are nothing more nor less than typical pinball games. They correspond in every respect to the concept of that term as it has always been known in the trade and by the public generally, clearly distinctive from and in contrast to the so-called "slot machine" or "one-armed bandit". The games here involved are precisely described by the dictionary definition of a pinball machine (Webster's New World Dictionary of the American Language (1951)):

> "A game of chance played on an inclined board, typically containing a number of holes surrounded by numerous pins, springs, etc., and marked with scores credited to the player if he causes a number of spring-driven balls to strike the pins or roll into the holes".

The games here involved were located in the State of Illinois, whose highest court has held that they are pinball games. On March 20, 1957 the Supreme Court of Illinois held in *People* v. *One Mechanical Device,* Docket No. 34029, that a pinball game, substantially the same as the three games here involved and made by the same manufacturer, was not a gambling device within the meaning of the Illinois Gambling Device Act, even though the machine was designed and constructed to award free plays which could be played off by winners. The Court said:

> "In summary it may be said that the device is a typical pinball machine."

The United States itself, in framing the question presented in this case, instinctively and correctly called the games involved in this case "pin-ball machines" (Petition for Writ of Certiorari, page 2) but in its brief the question

has been re-worded so that "pin-ball machines" are now called "mechanical games" (Brief for the United States, page 2).

There are marked structural and operating differences between pinball games and slot machines. It is nowhere suggested that the games in question contained spring-driven drums or reels with insignia or any of the other characteristics which are hall-marks of the classic slot machine.

It is not an exaggeration to state that any average person can readily distinguish between a slot machine and a pinball game (R. 20). One of the witnesses for the United States in this case testified that a slot machine "has cylinders that rotate after you pull a lever" and that the games here involved are "entirely different than a slot machine" (R. 20). The respondent's witness testified in detail as to the differences between slot machines and pinball games (R. 60-1).

In *United States* v. *Ansani*, opinion dated January 15, 1957 (C. A. 7), pending on petition for certiorari, No. 813, this Term, the Court of Appeals stated at page 3 of the slip opinion:

> "*A slot machine* is not a gambling device merely because it has coin slots or an automatic pay off mechanism. *It is a gambling device because its function and design are to allow one to stake money or any other thing of value upon the uncertain event of achieving the winning combination of insignia.*" (Emphasis added.)

The Supreme Court of Illinois said in *People* v. *One Mechanical Device*, Docket No. 34029, decided on March 20, 1957:

> "Whereas a slot machine or a crap table entails no skill whatever, affords no amusement beyond that which the player enjoys when he is paid money, and

within a few seconds parts the player from his money through his expectation of winning additional money, a pinball game is essentially an amusement game which can be, and frequently is, played for long periods of time with no reward to the player beyond the enjoyment of playing."

In *Chicago Patent Corporation* v. *Genco, Inc.*, 124 F. 2d 725 (C. C. A. 7th, 1941), the defendant, being sued for the infringement of a patent protecting free-play pinball machines, argued that these devices were gambling machines without utility and therefore beyond the protection of the patent laws. The Court of Appeals affirmed the finding of the lower court that the games were capable of legitimate use and that skill was not absent in the operation of the game, and that therefore the games were not gambling machines.

There is nothing unusual about the games here involved nor any reason why they are not typical pinball games. Although the Brief for the United States may give the impression (page 6) that the devices themselves show that players may be entitled to certain monetary amounts upon scoring free games, neither the backboard nor any other part of these games indicates that monetary amounts will be paid to players who have succeeded in scoring free games nor that a successful player shall be entitled to receive cash, premiums, merchandise, or tokens (United States Exs. 3, 4 and 5; R. 41). The officer of a corporation which manufactures devices competing with those here involved (R. 44-6), who admitted that he had a limited knowledge of the mechanism of the devices in this case (R. 46), testified that the reflex unit more or less balances out the high winnings as against the small winnings (R. 50). The engineer for the company which manufactured the games in this case, who had been with that company for 24 years (R. 54, 56) testified that the reflex unit does

not reduce the opportunity of winning in any manner (R. 62-3). The meter which records free plays not used by the player of the machine simply tabulates games which the machine owes the player. For example, if a player has registered his right to receive a certain number of free plays and then discontinues playing because he is unable or unwilling to continue at that time or in order to permit another player to intervene, the free plays are "knocked-off" the machine and recorded on the meter. When the player to whom the games are owed returns to play, the only procedure by which the location owner can give him the games to which he is entitled is by inserting coins to activate the machine or by handing the coins to the player to insert (R. 79). Since the location owner is entitled to receive these coins back from the owner of the machine, the meter is necessary to record the number of games handled in this manner. Furthermore, the meter is used to record payouts in jurisdictions where payouts are lawful (R. 79). See footnote 5 on pages 17-8 of this brief.

Neither the reflex unit nor the meter nor any other structural or operating feature of the pinball games here involved transform those games into slot machines with pull levers, drums or reels, insignia, or any of the other distinctive features of slot machines described in the succeeding sections of this brief.

2. The Machines Herein Are "Amusement" Devices, Not "Gaming" Devices.

The United States erroneously distinguishes between "amusement devices" and "gaming devices" instead of between "pinball games" and "slot machines." Nevertheless, the pinball games here involved *are* amusement devices and slot machines are gaming devices.

Slot machines are pure gambling devices. The player inserts a coin and pulls a lever, betting that the revolving

drums will come to rest in a combination which will deliver to him more coins than he put into the machine. He has no control over the device. Obviously, amusement does not result from watching the drums revolve for a few seconds.

In contrast, the machines with which this Court is concerned are essentially amusement devices. The player believes—or at least hopes—that he can so control the games that a designated score will be achieved. The element of chance or luck, far from being the controlling factor, is only an incidental feature which in part contributes to the amusement and attraction of the game.

Webster's New International Dictionary, Second Edition, defines "amusement" as:

> "Pleasurable diversion; entertainment, especially when characterized by quiet mirth; hence the state of being amused, as by something droll or humorous; that which amuses or entertains."

Black's Law Dictionary, Third Edition, defines "amusement" as:

> "Pastime; diversion; enjoyment."

The cases cited by the United States at pages 23 to 25 and in footnote 2 on page 17 of its brief have no applicability here. They hold that particular pinball games are gambling devices *under the applicable State gambling statutes.* The issue before this Court is whether pinball games are "so-called 'slot' machines" within the meaning of Section 4462. The pinball games involved here clearly fall within the statutory language of Section 4462(a)(1) as "any amusement * * * machine operated by means of the insertion of a coin, token, or similar object" and are subject only to the $10 per year tax which has been paid.

Nevertheless, if this were the issue, which it is not, it is possible to cite an equal number of cases which hold that

under applicable State gambling statutes, pinball games are *not* gambling devices,[7] are *not* lotteries,[8] and that the awarding of free plays does *not* convert the device into a gambling device.[9]

The highest court of the State of Illinois, where the games here involved were located, held that substantially similar games were not gambling devices and that the awarding of free plays did not convert them into gambling devices. The Supreme Court of Illinois held in *People* v.

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7. Cases holding that pinball machines are not gambling devices: *Commonwealth* v. *Mihalow*, 142 Pa. Super. 433, 16 A. 2d 656 (1940); *Williams* v. *State*, 65 Ga. App. 843, 16 S. E. 2d 769 (1941); *Chicago Patent Corporation* v. *Genco, Inc.*, 124 F. 2d 725 (C. C. A. 7th, 1941); *State* v. *Waite*, 156 Kan. 143, 131 P. 2d 708 (1942); *Childs* v. *State*, 70 Ga. App. 99, 27 S. E. 2d 470 (1943); *Brafford* v. *Calhoun*, 51 N. E. 2d 920 (Ohio Ct. App., 1943); *State of Kansas* v. *One Bally Coney Island No. 21011 Gaming Table*, 258 P. 2d 225 (Kansas, 1953); *Crystal Amusement Corp.* v. *Northrop*, 118 A. 2d 467 (Conn. Com. Pl., 1956); *People* v. *One Mechanical Device*, Docket No. 34029, opinion dated March 20, 1957, Supreme Court of Illinois, overruling *People* v. *One Pinball Machine*, 316 Ill. App. 161 (cited in Brief for the United States, page 17, note 2).

8. Cases holding that a pinball machine is not a lottery: *Gayer* v. *Whelan*, 59 Cal. App. 2d 255, 138 P. 2d 763 (1943); *Lee* v. *City of Miami*, 121 Fla. 93, 163 So. 486 (1935); *Ex Parte Pierotti*, 43 Nev. 243, 184 Pac. 209 (1919). Cf. case holding that a slot machine is a lottery: *State* v. *Brotherhood of Friends*, 247 P. 2d 787 (Wash., 1952).

9. Cases holding that the awarding of free plays does not convert device into a gambling device: *Washington Coin Machine Assn.* v. *Callahan*, 142 F. 2d 97 (C. A., D. C.); *Chicago Patent Corporation* v. *Genco, Inc.*, 124 F. 2d 725 (C. C. A. 7th); *Davies* v. *Mills Novelty Co.*, 70 F. 2d 424 (C. C. A. 8th); *Mills Novelty Co.* v. *Farrell*, 64 F. 2d 476 (C. C. A. 2d); *State* v. *Waite*, 156 Kan. 143, 131 P. 2d 708; *State* v. *One Bally Coney Island No. 21011 Gaming Table*, 174 Kan. 757, 258 P. 2d 225; *State* v. *Betti*, 23 N. J. Misc. 169, 42 A. 2d 640; *Overby* v. *Oklahoma City*, 46 Okla. Cr. 52, 287 Pac. 796; *In re Wigton*, 151 Pa. Super. 337, 30 A. 2d 352; *Commonwealth* v. *Kling*, 140 Pa. Super. 68, 13 A. 2d 104; *State* v. *One "Jack and Jill" Pinball Machine*, 224 S. W. 2d 854 (Mo. App.); *Crystal Amusement Corporation* v. *Northrop*, 19 Conn. Supp. 498, 118 A. 2d 467.

One Mechanical Device, Docket No. 34029, decided on March 20, 1957, as follows:

> "A pinball game which does not pay out money or anything else of value and therefore on which money cannot be staked, hazarded, bet, won or lost, is not a gambling device and does not fall within the prohibition of the statute. *People v. One Slot Machine*, 303 Ill. App. 337."

The Court further said:

> "We are of the opinion that a free play is neither money, the equivalent of money, nor a valuable thing. It is unrealistic to hold that the possibility of winning a greater or lesser amount of amusement is gambling because if it were, most amusement games would be barred by the statute."

In the case of *In re Mapakarakes*, 8 N. Y. S. 2d 826 (Sup. Ct., Spec. Term, N. Y. County, 1938), cited by the United States at page 24 of its brief, the court said at page 827:

> *"Certain principles regarding the operation of these pin ball machines seem to be established. Primarily, they are not ipso facto illegal gambling devices under Article 88, section 970 et seq., of the Penal Law."*

Thus although the question of whether a pinball game is or is not a "gaming" device is not determinative of whether it is a "so-called 'slot' machine," it is clear that slot machines are universally held to be gaming devices whereas most jurisdictions construe pinball games to be "amusement" devices.

The United States argues in its brief nevertheless (pages 16-17) that respondent's machines are "gaming devices" and cites five Federal cases to sustain that proposition. Two of the cases cited are clearly inappropriate, *United States* v. *24 Digger Merchandising Machines*, 202 F. 2d 647 (8th Cir. 1953); *United States* v. *10 Digger Machines*,

109 F. Supp. 825 (D. C. E. D. Mo. 1952). These are cases under the Johnson Act. By an additional paragraph (15 U. S. C. § 1171(a)(2)) that Act defines "gambling device" to include not only so-called slot machines but also "any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token or similar object and designed and manufactured so that when operated *if may deliver*, as a result of the application of the element of chance, any money or property" (Emphasis added). These "digger" machines were held to fall within the additional paragraph; the pinball games here involved do *not* deliver money or property and hence would not fall within the additional paragraph of the Johnson Act. *United States* v. *19 Automatic Pay-Off Pin-Ball Machines*, 113 F. Supp. 230 (W. D. La.), cited by the United States in footnote 2 on page 17 of its brief, likewise arose under the Johnson Act and the machines involved contained payout mechanisms within the express language of that Act. *Johnson* v. *Phinney*, 218 F. 2d 303 (5th Cir. 1955), cited in United States' Brief in footnote 1 on pages 16-7, is distinguishable since the issue arose out of the applicability of the wagering tax, which expressly excludes coin-operated devices. The devices in that case were not coin-operated such as the games here involved which are taxed by Section 4462 of the Internal Revenue Code. *Tooley* v. *United States*, 134 F. Supp. 162 (D. C. Nev. 1955), turned solely on the question of whether chance played a part in the operation of the "boom and claw." The court in the *Tooley* case did not pass upon the meaning of the words "so-called 'slot' machine"; it merely held that in that particular device the "element of chance preponderates over the element of skill." None of these cases lends any assistance to the determination of the issue in the present case.

3. Slot Machines Are Devices of Pure Chance Whereas Pinball Games Require the Application of the Skill of the Player.

The use of the words "skill" or "chance" in anti-gambling statutes has caused courts throughout the country to become involved in endless exercises in semantics. Most of the debates have centered around statutes prohibiting games of chance or prohibiting all games except games of skill. Some courts have construed particular statutes to require the prohibition of any game containing *any* element, however slight, of chance. Other courts have observed that some element of chance exists in every occurrence. The Supreme Court of Illinois in upholding in *People* v. *Monroe*, 349 Ill. 270 (1932) the validity of a statute authorizing the pari-mutuel system of betting on horse racing, said at page 275:

> "Every event in life and the fulfillment of every lawful contract entered into between parties is contingent to at least some slight extent upon chance. No one would contend, however, that a contract knowingly and understandingly entered into between two parties is a gaming contract merely because its fulfillment was prevented as the result of the befalling of unknown or unconsidered forces, or by the issue of uncertain conditions, or by the result of fortuity."

Some courts have interpreted specific statutes as prohibiting games in which chance predominated over skill and as permitting games in which skill predominated over chance. Other courts have interpreted local statutes as prohibiting only those games in which there is no skill and where the operation depends entirely upon chance. None of these statutes nor the cases interpreting them lend any assistance to a determination of what Congress intended in 26 U. S. C. 4462(a)(2), except indirectly by showing the utter futility of attempting to enforce a statute where the administrator must measure how much skill and how much chance enter into a particular operation.

Although chance enters into the operation of a pinball game as it does in "every event in life," skill is also a factor to a degree, which is not true of a slot machine.

In pinball games the insertion of the coin merely releases the balls for play. From that point on the play of the game is under the control of the player who, with greater or lesser skill in the application of the proper amount of force, releases the plunger which propels the balls. Thereafter the manual dexterity of the player in slightly tilting or nudging the machine and, in some games, manipulating the "flippers" to again propel the ball, is instrumental in achieving a high score. In none of these games does a favorable result depend only on pulling a lever at the propitious time in the mathematical sequence of plays on the machine. The following features of the pinball games involved here clearly evidence that they are so constructed and designed as to make the operation thereof depend in substantial part upon the skill of the player:

1. The ball guide plate located under the ball shooter or plunger is equipped with either six or seven scored lines in order to provide a means for the player to gauge the intensity of his shots and thereby skillfully start balls down left, right or center portions of the playfield (R. 21, 28, 31, 48, 51, 57).

2. The knob on the ball shooter is designed to afford the player's fingers very little contact surface, thereby assuring the player a maximum amount of sensitivity in gauging his shot (R. 57).

3. A player exercises judgment in determining what numbered hole is required to light up a sequence and in deciding what side of the playing field the ball should be shot to (R. 57).

4. The 35 to 45 posts on the playing field are equipped with rubber rings. These cause the ball to bounce to the

left or right or backwards. This rebound can be increased or cushioned by nudging the machine (R. 58).

5. Nudging is effected by hitting the left, right or front side of the front rail of the game. The legs of the cabinet are so constructed as to allow the whole cabinet to be moved forward, sideward or toward the player to permit nudging (R. 21, 48, 51, 57, 58).

6. The officer of the corporation which manufactures devices competing with those involved in this case (R. 44-6) testified that the major difference between the games in this case and those manufactured by his company was in the amount of skill employed in the operation (R. 46) and that one of the features of his games adding to the necessity of using skill was "flippers" enabling a player to flip the ball back on the playing field (R. 45, 46). One of the games in this case had a "jumbo flipper" which propelled the entire playing field forward (R. 58, 75-6), so that, under the test advanced by the United States' own witness, skill predominated in that particular game and it is clearly an amusement game. The same witness for the United States also readily admitted that skill is involved in the operation of all three of the pinball games here involved (R. 51).

7. There is skill and judgment and playing experience in utilizing and selecting certain phases of the game features available on the back glass and in trying to get certain numbered holes to obtain the highest possible score (Tr. 57, 59, 71).[10] In *People* v. *One Mechanical Device*, Docket 34029, decided on March 20, 1957, the Illinois Su-

10. Regardless of the extent to which chance may effect changes in the so-called game features, no game is completed until at least five balls have been played. Thus the outcome of every "operation" of the machine, as such term is used in Section 4462(a), is necessarily exposed to exercise by the player of each of the several elements of skill described in detail by respondent's witness (R. 56 ff.).

preme Court said of a game substantially similar to the ones here involved:

> "The object of the game, the distribution and position of the holes, and the alternative methods of scoring cause the player to exercise some judgment in the operation of the game."

Webster's New International Dictionary, 2d Edition, 1955, defines "skill" as:

> "Understanding; discernment; judgment; also judiciousness.
>
> "The ability to use one's knowledge effectively and readily in execution or performance; technical expertness; proficiency.
>
> "A particular art or science; now usually, a power or habit of doing a particular thing competently; a developed or acquired aptitude or ability; an accomplishment.
>
> "Psychol. (a) smoothness and good coordination in the execution of a learned motor performance; (b) a motor performance that has become facile and well integrated as the result of practice."

Black's Law Dictionary, 3rd Edition, defines "skill" as:

> "Practical and familiar knowledge of the principles and processes of an art, science, or trade, combined with the ability to apply them in practice in a proper and approved manner and with readiness and dexterity."

A dichotomy between the well-known slot machine where no skill is necessary and the well-known pinball game where skill is needed, is logical and enforceable. Any tax agent can readily distinguish between the two devices and can exact the $250 tax from slot machines and the $10 tax from pinball games. But how would the tax be enforced if the tax agent were required to apply mental calipers to determine relative amounts of chance and skill or if a

particular device was construed to be a slot machine on this day (when payouts were made) and a pinball game on that day (when they were not)?

4. A Pinball Game Is Not Transformed Into a Slot Machine by Any Action of Its Owner or Possessor.

The United States contends that the taxability of pinball games is to be determined by the *use* to which they are put. That contention is wholly inconsistent with the clear meaning of the statute.

The separate taxes imposed by Sections 4461-4463 are placed on the coin-operated machines themselves, *not on the use to which the machine may be put.* If two players of a pinball machine decide to gamble on the results of their play, the machine is not thereby converted into a gambling device. A pinball machine cannot be transformed into something else merely by the award of nominal prizes for the attainment of high scores, or the payment of cash in lieu of additional amusement. The machine remains the same. It is still a device whereby one or more balls are propelled through a chute by the operation of a plunger in the hands of the player, with the ball then registering a score by hitting various bumpers or other objects or by dropping into holes and actuating electrically controlled circuits. The redemption of unused free games by the location owner does not transform the machine into one containing a pull lever and insignia on reels or drums. The game of golf also embodies an element of chance and may be made the subject of a wager, but it does not cease to be golf merely because players place nominal bets upon the outcome of a particular game. The pinball machines here involved could not have been converted into slot machines solely by reason of a wager made by two or more players upon their respective abilities to attain a given score. They could not be so converted by anything done or not done by the proprietor.

In *Stoutamire* v. *Pratt*, 148 Fla. 690, 5 So. 2d 248 (1942), the Florida Supreme Court said at page 250:

> "Of course, almost any sort of a mechanical device may be used to determine the result of a wager. The ordinary coin-operated scales may be used for such purpose, thus: Three men may gamble on guessing the weight of a fourth man according to the mechanical coin-operated scales and, when they have each registered his guess, put a penny in the slot, have the fourth man step on the scales and thereby determine the winner. There is practically no limit to the matters which may be made the subject of gambling or wagers."

In *Commonwealth* v. *Mihalow*, 142 Pa. Super. 433, 16 A. 2d 656 (1940), the game involved was a pinball-type miniature bowling game. On page 659 the court said:

> "Many things made for proper and legitimate purposes may be used for gambling, but what may be used as the subject of a bet is not *ipso facto* illegal or a gambling device. A horse race is not a gambling device, nor is a game of golf, nor a game of baseball, nor a game of billards; but betting on them is gambling. To say that this machine does not have any element of chance is to shut our eyes to the obvious: but in many games which are recognized as games of skill there is present some element of chance, and in many games of chance there is often present an element of skill."

If it were possible to convert a pinball game into a "so-called 'slot' machine" through its use, it would be possible to likewise transform any coin-operated amusement game into a slot machine, which not even the Treasury Department has ever contended. The other amusement machines covered by the $10.00 tax are not converted into slot machines simply by adding the element of a possible prize. For example, the simulated bowling, baseball, football, hockey, and basketball games and the various types of gun games do not become slot machines because a pro-

prietor decides that the attainment of a designated score should entitle the player to a prize. The games continue to be as different in structure from slot machines as they are when the attainment of a designated score entitled the player to additional free games. A letter dated in 1951, written by the Deputy Commissioner of Internal Revenue and read into evidence in this case (R. 90-1), stated in part as follows:

> "The coin-operated device 'Gun Patrol' regardless of whether prizes are offered for scoring hits, is considered to be a coin-operated amusement device since the successful operation is attained by the player's skill, as distinguished from the element of chance predominant in slot machines or other similar gaming devices. Accordingly, persons maintaining for use such devices on premises occupied by them incur special tax liability of $10.00 per year per machine."

Section 4462(a)(2) requires that the machine "may deliver or entitle the person playing" to receive cash or other valuable thing. United States Exhibits 3, 4 and 5 (R. 41) do not show that successful players may receive or be entitled to receive cash or other valuable thing. A pinball machine is not transformed into a slot machine by any action of its owner or possessor.

II.

IF THE PINBALL GAMES HERE INVOLVED ARE CONSTRUED TO BE "SO-CALLED 'SLOT' MACHINES" THE STATUTE IS UNCONSTITUTIONAL AND VOID.

A. Such Construction Would Inject Such Vagueness and Uncertainty Into a Penal Statute as to Constitute Denial of Due Process of Law.

Respondent contends that Sections 4461 to 4463 are clear and unambiguous. The term "slot machine" is given form by its use in common parlance and by definition in the only other Congressional enactment which uses the term. If any ambiguity does exist, the meaning of that term is clearly resolved by the legislative history of the statute and the other criteria for construing statutes. If, however, the terms "so-called 'slot' machine" is construed to embrace devices which are wholly different in structure and operation from the familiar slot machine, then the statute is unconstitutional and void. To so construe the statute would demand "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." See *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921). The operation of Sections 4461 to 4463 would be so uncertain that enforcement thereof would leave to conjecture the dividing line between that which is lawful and that which is unlawful. Such a construction of the statute would constitute a denial to this respondent of due process of law. *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931); *United States* v. *Five Gambling Devices*, 346 U. S. 441, 453 (1953). In *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926), the Supreme Court said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will

> render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The machines introduced as United States' Exhibits 3, 4 and 5 were of three varieties, each embodying special features which the others did not possess. A government agent testified that respondent also maintained a coin-operated bowling game and a music machine on the premises (R. 16). Testimony with respect to the alleged redemption of free plays was offered only in connection with the "Variety" and "Gaiety" machines (R. 24, 29). If the ordinary taxpayer cannot reasonably determine which, if any, of these devices are "slot machines", the respondent should not be held criminally responsible for failure to make that determination. Extension of the term "slot machine" to any of the devices involved herein would pervert the language adopted by Congress and would extract the last vestige of certainty and meaning from that term.

B. Such Construction Would Be Arbitrary and Discriminatory and Would Invalidate the Statute.

It is clear that the award of a "free play" without more does not convert an amusement machine into a gaming device. Section 4462(a)(2) refers only to the award of "cash, premiums, merchandise or tokens", and a free play is none of these.

A free play is a condition of the mechanism which permits continued operation without the insertion of an additional coin; it is, in one sense, the mechanical equivalent of that coin. The player who "wins" a free play is entitled

to use that play in lieu of an additional coin, or he may "sell" it to another player or he may abandon his right and thus enable the next player to operate the machine without depositing a coin. In any of these situations, the game apparently remains an "amusement machine". If a player of the pinball machines herein agrees to forego his right of replay in consideration of the payment of ten cents by respondent, he has merely sold a mechanically-delivered privilege, existing after completion of the game's operation, for its true equivalent in cash. This transaction, consisting of the payment of money in exchange for the surrender of a privilege of equal value, does not relate back to the earlier operation of the device itself and convert that device into a gaming machine. Congress did not so intend. But if that is the law, it presents a distinction too arbitrary and unreal to withstand the constitutional tests.

III.

IN ANY EVENT THE RESPONDENT DID NOT WILFULLY FAIL TO PAY THE TAX IMPOSED BY SECTION 4461(2) OF THE INTERNAL REVENUE CODE.

The indictment charges that respondent, in violation of Section 7203 of Title 26, U. S. Code, "wilfully" failed to pay the tax required to be paid by Section 4461(2) of that title. It is agreed that the $250 tax imposed by that subsection was not paid by respondent prior to the time or times mentioned in the indictment, but that the $10 tax imposed by subsection (1) of that section was paid by respondent with respect to all periods material hereto (R. 11, 6).

The substantive provisions of the Code relating to coin-operated amusement and gaming machines have been in effect without change (except in 1942) since the enactment of H. R. 5417 in 1941. Yet, so far as counsel for the re-

spondent have been able to determine, this is a case of first impression; during most of the fourteen years since 1941 no attempt was made to prosecute a failure to pay the $250 tax with respect to pinball devices. Until as recent a date as 1952 the Treasury Department itself treated pinball machines as separate and distinct from slot machines (Resp. Ex. 1 R. 81, 94). As heretofore pointed out, the plain meaning of the statutory language provided ample reason for respondent's belief that his devices were not taxable as slot machines. That belief was further confirmed by the legislative history of the Code provisions and other criteria. Moreover, for reasons heretofore set forth, it cannot be denied that substantial doubts exist as to the validity of any attempt to impose criminal penalties with respect to the devices herein without denying respondent due process of law.

Even if the tax was applicable to these machines, therefore, and even if this decision should not fail for want of due process, it is nevertheless apparent that the United States has failed to prove a wilful violation of the statute.

It has frequently been held that the courts may properly consider, in determining the wilfulness of an offense under the Internal Revenue laws, evidence that a substantial basis existed for a belief that the asserted tax was not in fact payable. See *United States* v. *Phillips* (7th Cir.), 217 F. 2d 435, and cases cited therein.

In *United States* v. *Kahriger* (3rd Cir.), 210 F. 2d 565, the defendant was convicted of having "wilfully" failed to register for and to pay the special occupational tax relating to wagering required by Sections 3290 and 3291 of the Internal Revenue Code. It was admitted that defendant had deliberately refused to register and pay the tax, but he had done so in the belief that the statute was unconstitutional in requiring his self-incrimination under Fed-

eral and state laws. The decision of the Supreme Court in an earlier appeal from the same prosecution, *United States* v. *Kahriger*, 345 U. S. 22 (1953), [illegible] en the first adjudication by that tribunal of the issue of self-incrimination posed by the statute. The Court of Appeals for the Third Circuit reversed the conviction and remanded with direction to enter judgment of acquittal. "It cannot be said," the court held, "that Kahriger's attitude was unreasonable * * * under the circumstances." The court continued:

> "There is nothing in the record, no scintilla of proof, that Kahriger refused the information wilfully, that is to say that he refused to register because of 'bad faith' or 'evil intent'. True his failure to register was 'voluntary', but that is not sufficient. * * * In our opinion the United States has completely failed to meet the burden of proof imposed upon it under the circumstances."

To the same effect, see *United States* v. *Murdock*, 290 U. S. 389 (1933).

Here, as in the *Kahriger* case, important statutory and constitutional issues are to be resolved for the first time. This respondent is in a far stronger position than Kahriger, however, for the latter could not question that the statute, if valid, was applicable to his activities. Surely it cannot be said that respondent acted in "bad faith" or with "evil intent" or wilfully.

CONCLUSION.

The statutory language and the legislative history of the statute clearly supports the judgment of the Court of Appeals.

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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